Supreme Court, U.S.
FILED
APR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether the Equal Protection Clause prohibits the City of Richmond from remedying the effects of racial discrimination on minority participation in city construction contracts by enacting a temporary program that, subject to a waiver provision, requires contractors to subcontract a portion of their contracts to minority business enterprises.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
RICHMOND'S MINORITY BUSINESS UTILIZATION PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.	7
A. The Court Of Appeals' Decision Is Inconsistent With *Fullilove v. Klutznick.*	7
B. The Richmond Plan Promotes Compelling Government Interests And Does Not Impose Unfair Burdens On Nonminority Contractors.	14
1. *The Richmond Plan promotes the compelling interest of remedying racial discrimination in the construction industry.*	14
2. *Richmond may enact a race-conscious remedy for prior discrimination in the local construction industry without admitting complicity in racial discrimination.*	23
3. *Richmond's plan does not unfairly burden nonminority contractors.*	28
CONCLUSION	30
Appendix I	
Minority Business Enterprise Programs of State Governments	1a
Appendix II	
Minority Business Enterprise Programs of Municipal and County Governments	14a

TABLE OF AUTHORITIES

CASES: Page

Andrus v. Allard, 444 U.S. 51 (1979) 29
Associated General Contractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987), petition for rehearing pending 10
Board of Directors v. Rotary Club, 107 S.Ct. 1940 (1987) 23, 24
Bob Jones University v. United States, 461 U.S. 574 (1983) 23-24
Byrd v. Local No. 24, IBEW, 375 F. Supp. 545 (D. Md. 1974) 25
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 19, 20
Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) 25
Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1880) 11
FERC v. Mississippi, 456 U.S. 742 (1982) 10
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 28
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 28, 29
Fullilove v. Klutznick, 448 U.S. 448 (1980) ..... *passim*
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 17
Green v. County School Board, 391 U.S. 430 (1968) 23
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 24
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 16, 17, 18
James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970) 25
Johnson v. Transportation Agency, 107 S.Ct. 1442 (1987) 13, 16, 18, 28
Katzenbach v. Morgan, 384 U.S. 641 (1966) 11
Local No. 93, Firefighters v. Cleveland, 478 U.S. 501 (1986) 28
Local 28 of Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986) 17, 25, 28
McDaniel v. Barresi, 402 U.S. 39 (1971) 25

TABLE OF AUTHORITIES—Continued

Page

National Black Police Association v. Velde, 712 F.2d 569 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984) 25
North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 23, 25, 26
Norwood v. Harrison, 413 U.S. 455 (1973) 25
Percy v. Brennan, 384 F. Supp. 800 (S.D.N.Y. 1977) 25
Railway Mail Association v. Corsi, 326 U.S. 88 (1945) 24
Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 24
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 11, 27, 28
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 24
Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) 29
Runyon v. McCrary, 427 U.S. 160 (1976) 24
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 21
Steelworkers v. Weber, 443 U.S. 193 (1979) 16, 18, 28
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 25-26
The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) 11
United States v. Paradise, 107 S.Ct. 1053 (1987) 14, 25, 28
White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) 24
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) ..... *passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const. Amend V, Due Process Clause 7
U.S. Const. Amend. XIV
Equal Protection Clause 7
Section 5 ..... 10-11, 12, 13
Public Works Employment Act of 1977, Section 103(f)(2), 42 U.S.C. 6705(f)(2) 7, 8, 9, 10, 12

TABLE OF AUTHORITIES—Continued

CONGRESSIONAL MATERIALS: Page

Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) 11

BOOKS:

H. Flack, The Adoption of the Fourteenth Amendment (1965) 11
J. Gillies & F. Mittelbach, Management in the Light Construction Industry (1962) 18
R. Glover, Minority Enterprise in Construction (1977) 18
R. Harris, The Quest for Equality (1960) 11
J. tenBroek, The Antislavery Origins of the Fourteenth Amendment (1951) 11

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include municipal and county governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the constitutionality of a temporary minority subcontracting program adopted by the City of Richmond, Virginia. The program provides that any firm awarded a construction contract by the City shall, unless it receives a waiver, subcontract 30% of the value of the contract to minority business enterprises.

This is a case of great importance to the *amici*. Programs comparable to Richmond's are very common among state and local governments. After the Court noted probable jurisdiction in this case, we undertook a survey of state, municipal, and county governments; the results are reproduced in the appendices to this brief.

The survey identifies 36 States and 190 local governments throughout the Nation that have adopted programs

that use a variety of devices, including numerical goals or targets, to expand minority access to government contracts. The vast majority of these programs were adopted after this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which upheld a similar program enacted by Congress. Many of the programs, including Richmond's, were modeled on the federal program upheld in *Fullilove*. As we explain below (pages 7-10), the decision of the court of appeals in this case imposes more stringent requirements on state and local governments than *Fullilove* imposed on the federal government. Many state and local programs, therefore, would be jeopardized by the approach taken by the court of appeals, if it were to prevail.

These efforts by state and local governments represent a practical and constructive attempt to deal with the effects of discrimination at the level of government where such problems are best addressed. Because *amici* believe that it is exceptionally important that those efforts not be jeopardized, we offer this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. In April 1983, the Richmond City Council adopted a Minority Business Utilization Plan. The Plan provides that a contractor who is awarded a construction contract by the City shall, unless granted a waiver, subcontract at least 30% of the value of the contract to minority business enterprises (MBEs).[2] J.S. App. 2a. The City will grant a waiver if a "sufficient [number of] . . .

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk.

[2] The Plan contains a detailed definition of which businesses qualify as minority business enterprises. These provisions require that the firm be owned by members of minority groups and that it be either controlled or operated by minority group members. See J.S. Supp. App. 115-116, 251-252. A general contractor that is itself a minority business enterprise need not subcontract 30% of its contract to other MBEs. *Id.* at 247. The Plan requires the City to verify that an enterprise claiming to be an MBE is not a sham. See *id.* at 62.

qualified [MBEs] . . . are unavailable or are unwilling to participate in the contract." J.S. Supp. App. 67-68. The Plan is explicitly "remedial" (*id.* at 248) and temporary; it expires at the end of June 1988 (*ibid.*).

The City Council adopted the Plan after holding a hearing during which it received testimony and information about the history of public construction contracting in Richmond. The Council learned that during the preceding five years, only two-thirds of 1% of the dollar value of construction contracts awarded by Richmond was awarded to MBEs. J.S. Supp. App. 38, 115. The population of Richmond is approximately 50% minority. *Ibid.* The City Manager and a member of the City Council stated, on the basis of their experience, that there was widespread discrimination in the construction industry in general and in Richmond in particular; opponents of the Plan within the Council, and representatives of contracting associations who spoke at the hearing, did not dispute these statements. *Id.* at 38, 164-165.

2. In September 1983, the City invited bids on a project that involved the installation of certain plumbing fixtures in the City Jail. Appellee was the only bidder. After the bidding was closed, appellee sought a waiver of the requirement that it subcontract with an MBE. J.S. App. 2a-3a; J.S. Supp. App. 120-124. The City declined to grant the waiver and, when appellee sought to increase the price of its contract with the City, the City reopened the bidding on the contract. The City invited appellee to submit a new bid. J.S. App. 3a.

Instead, appellee brought this action, which was removed to the United States District Court for the Eastern District of Virginia. Appellee sought injunctive and declaratory relief and damages, claiming, among other things, that the Plan violated its rights under the Equal Protection Clause of the Fourteenth Amendment. The district court rejected appellee's claims (J.S. Supp. App. 110-232), and the court of appeals affirmed (*id.* at 1-109). This Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of ap-

peals, and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). See 106 S.Ct. 3327 (1986).

3. On remand, a divided court of appeals reversed the judgment of the district court and held the Plan unconstitutional. J.S. App. 1a-26a. The majority acknowledged that a City may use a racial preference in order to "redress a practice of past wrongdoing" (J.S. App. 14a). But the majority ruled that the Richmond Plan was invalid because there was "no record of prior discrimination by the city" in this case. *Id.* at 6a. The majority explained that, for example, "[t]here has been no showing that qualified minority contractors who submitted low bids were passed over . . . [or] that minority firms were excluded from the bidding pool." *Id.* at 8a.

The majority further asserted that the statements made during the City Council hearing were not sufficient to support the Plan because they were "conclusory" and "highly general" (J.S. App. 6a). The majority also rejected as "spurious" (*id.* at 8a) the City's argument that an inference of discrimination was raised by the virtual absence of city contracts awarded to minorities, even though minorities constituted half the City's population. The majority stated that this disparity did not "demonstrate discrimination" because "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original).

Finally, the majority concluded that even if the Plan were supported by the need to remedy past discrimination, it would be unconstitutional because "it is not narrowly tailored to that remedial goal." J.S. App. 11a. The majority asserted that the 30% figure was chosen "arbitrarily"; that the definition of an MBE was not narrowly tailored; that the provision for a waiver was too "restrictive"; and that the temporary nature of the plan was immaterial because "[w]hether the . . . [P]lan will be retired or renewed in 1988 is, at this point, nothing more than speculation." *Id.* at 11a-13a.

Judge Sprouse dissented. J.S. App. 14a-26a. The court of appeals denied rehearing en banc by a vote of 6-5. *Id.* at 27a-28a.

SUMMARY OF ARGUMENT

A. The decision of the court of appeals is inconsistent with *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *Fullilove* upheld a federal program that is indistinguishable from Richmond's Minority Business Utilization Plan in every relevant respect. Moreover, the evidence supporting the Richmond Plan is stronger than the evidence adduced in *Fullilove*.

Fullilove cannot be distinguished on the ground that it involved the exercise of congressional power under Section 5 of the Fourteenth Amendment. The basis of Congress's broad Section 5 power is the concern that the States might fail to act against discrimination. Here, Richmond has acted to remedy discrimination. It would be paradoxical to interpret the grant of power to Congress in the Fourteenth Amendment in a way that reduces the authority of state and local governments to remedy racial discrimination. In addition, state and local remedies for discrimination have many practical advantages over remedies imposed by the more remote and less knowledgeable federal government.

B. Although *Fullilove* is sufficient to dispose of this case, the Richmond Plan also satisfies the standards prescribed in this Court's other decisions concerning race-conscious measures.

1. Richmond has a strong basis for concluding that racial discrimination in the construction industry affected minorities' access to City contracting opportunities. The most compelling evidence is that minorities, who are half of Richmond's population, received less than one percent of public construction contracting funds. The court of appeals' dismissal of that evidence is manifestly erroneous. In addition, Richmond had nonstatistical evidence of discrimination from several sources.

The court of appeals ruled that this evidence was inadequate because the Richmond City Council did not

make a "finding" or "showing" that identified particular discriminatory acts. This Court's decisions, however, establish that such findings are not required. In addition, requiring a government to identify discriminatory acts will inject an unnecessarily divisive and adversarial element into the process of designing remedies for racial discrimination.

A race-conscious remedy was a fully appropriate response to the discrimination that Richmond identified in the construction industry. Simply requiring that firms in the industry not discriminate would not have been effective. Because of prior discrimination, minority firms now lack experience; they would accordingly be at a competitive disadvantage even if there were no longer any discrimination at all. An effective remedy for the vestiges of discrimination must provide a temporary way to overcome that competitive disadvantage.

2. Contrary to the court of appeals, Richmond was entitled to adopt a race-conscious remedy for discrimination in the construction industry even if the City itself did not discriminate. As this Court has often held, state and local governments have a compelling interest of the highest order in remedying private discrimination. That interest is even greater when the City is attempting to ensure that its own funds will not be spent in a way that supports, or perpetuates the effects of, private discrimination. A race-conscious measure will sometimes be the only effective means of promoting these exceptionally important government interests.

3. Richmond's Plan does not unfairly burden nonminority contractors. To a large extent, the burdens imposed by the Richmond Plan fall on the taxpayers. In that respect, the Plan is superior to nearly every other affirmative action measure that this Court has considered. The burden on nonminority subcontractors who compete with minority firms is limited and diffuse. Moreover, the Richmond Plan does not uproot settled expectations but only denies, at most, the contingent possibility of future economic gain.

ARGUMENT

RICHMOND'S MINORITY BUSINESS UTILIZATION PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. The Court Of Appeals' Decision Is Inconsistent With *Fullilove v. Klutznick*.

1. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court held that Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), does not violate the equal protection component of the Fifth Amendment's Due Process Clause. Section 103(f)(2) provided that 10% of the funds granted under the Act was to be used to procure services and supplies from MBEs. The Richmond Minority Business Utilization Plan was modeled on Section 103(f)(2), and it is indistinguishable from Section 103(f)(2) in every relevant respect. Indeed, the arguments supporting the Richmond Plan are significantly stronger than those advanced in support of Section 103(f)(2).

a. Section 103(f)(2) was supported by the same kind of statistical disparity as the Richmond Plan—a disparity between the percentage of minorities in the general population and the percentage of government contract funds received by minorities. The court below, without referring to *Fullilove*, condemned as "spurious" and "not . . . meaningful" the overwhelming disparity between the percentage of minorities in Richmond's population and the percentage of Richmond's public construction contract funds that had been awarded to minorities. J.S. App. 8a, 10a. But in *Fullilove*, a majority of the Members of this Court relied on precisely the same statistical comparison to support their conclusion that Section 103(f)(2) was a permissible remedy for past discrimination.[3]

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[3] See 448 U.S. at 459 (opinion of Burger, C.J.) ("in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-

Indeed, in *Fullilove* the statistical disparity—minorities were 15% to 18% of the population and received less than 1% of public contracting funds—was far less dramatic than the 0.67% to 50% disparity that Richmond faced. The conclusion that Richmond had an adequate statistical basis for enacting a subcontracting requirement therefore follows *a fortiori* from *Fullilove*.

b. The court of appeals ruled that the Richmond Plan was not narrowly tailored to its remedial objective because the City's waivable 30% goal was an "arbitrar[y] . . . figure [that] simply emerged from the mists." J.S. App. 11a. *Fullilove* rejected just such an attack on the 10% figure used by Congress. See, *e.g.*, Brief for Petitioner General Building Contractors, *Fullilove v. Klutznick*, No. 78-1007, at 22 ("Congress made a purely arbitrary selection" of a 10% requirement).

Justice Powell explained in *Fullilove* why Congress's choice of a 10% requirement was reasonable, and his explanation fully justifies the waivable 30% figure chosen by Richmond. Justice Powell explained that the 10% requirement of Section 103(f)(2) was warranted because that figure fell approximately "halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-514 (Powell, J., concurring). See also *id.* at 488-489 (opinion of Burger, C.J.). There were almost no minority contractors in Richmond (see J.S. Supp. App. 164), which has a minority population of 50%. The City's choice of a waivable 30% goal is therefore firmly supported by Justice Powell's reasoning.

18% of the population"); *id.* at 562-563 ("[The] 10% MBE participation requirement . . . was thought [by Congress] to be required to [avoid] . . . repetition of the prior experience . . . [in which] participation by minority business account[ed] for an inordinately small percentage of government contracting."); *id.* at 511 (Powell, J., concurring) ("By the time Congress enacted § 103(f)(2) in 1977, it knew that other remedies had failed . . . [because] the fact remained that minority contractors were receiving less than 1% of federal contracts."); *id.* at 520 (Marshall, J., concurring in the judgment).

c. The court of appeals' approach to the nonstatistical bases of the Richmond Plan is similarly irreconcilable with *Fullilove*. The court of appeals discounted the statements, made during the Richmond City Council's hearing, that the construction industry in Richmond had been marked by discrimination, on the ground that these statements were "conclusory," "general," and often made by supporters of the Plan. J.S. App. 6a. But in *Fullilove*, a majority of the Members of this Court relied extensively on statements of comparable generality made by supporters of Section 103(f)(2). Indeed, the statements on which the Court relied in *Fullilove* were, for the most part, made in connection not with Section 103(f)(2) but with other federal programs to aid minority enterprises. See 448 U.S. at 458-463 (opinion of Burger, C.J.); *id.* at 504 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring in the judgment).

d. The court of appeals ruled that the City's plan was invalid because the City had not made "showing[s]" (J.S. App. 8a) or "particularized findings" of prior discrimination (*id.* at 5a). But Chief Justice Burger explicitly noted in *Fullilove* that Section 103(f)(2) "recites no preambulary 'findings'" (448 U.S. at 478). Indeed, a majority of the Members of the Court emphasized that it is *inappropriate* to require a legislative body to produce specific findings to support the actions it takes.[4]

In *Fullilove*, of course, the question was whether Congress should be required to make specific findings. But

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[4] See 448 U.S. at 478 ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."); *id.* at 502-503 (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. . . . [F]orc[ing] Congress to make specific factual findings with respect to each legislative action . . . would mark an unprecedented imposition of adjudicatory procedures upon . . . the legislative process."); *id.* at 520 n.4 (Marshall, J., concurring in the judgment) (The "view [that] Congress must make particularized findings . . . is fundamentally misguided.").

imposing such requirements on a state or local legislative body is at least as intrusive and unjustifiable. Cf. *FERC v. Mississippi*, 456 U.S. 742, 777-778 (1982) (O'Connor, J., dissenting). The inappropriateness of the requirement of specific findings stems from the nature of the legislative process itself. When elected representatives act, they bring to bear knowledge that they have gathered from a wide range of sources, including their general experience in public life and their contacts with constituents. This collective knowledge cannot be cabined in "findings" or "showings" about specific acts of discrimination.

e. The court below appears to have concluded that the Richmond Plan was invalid because it was not based on evidence of discrimination by the City itself. J.S. App. 5a, 6a, 8a, 9a. But there was no suggestion in *Fullilove* that Section 103(f)(2) was justified because of discrimination by the federal government, as a dissent in that case pointed out. 448 U.S. at 528 (Stewart, J., dissenting). Section 103(f)(2), like the Richmond Plan, was directed to discrimination in the construction industry and among the recipients of federal grants. See, *e.g.*, *id.* at 475, 478 (opinion of Burger, C.J.); *id.* at 505-506 (Powell, J., concurring).

2. The court of appeals did not attempt to reconcile its decision with *Fullilove* or to explain why state and local subcontracting requirements must meet standards that are stricter than those specified in *Fullilove*. Other courts of appeals, however, have asserted that Congress has greater power to remedy racial discrimination than state and local governments have. See, *e.g.*, *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922, 928-934 (9th Cir. 1987) (petition for rehearing pending).

a. The notion that Congress's authority to remedy discrimination is greater than that of state and local governments is unfounded in the law, and represents an unwarranted inversion of important values of federalism. It is true, of course, that Section 5 of the Four-

teenth Amendment greatly expanded the power of Congress to remedy racial discrimination. See *Katzenbach v. Morgan*, 384 U.S. 641, 650-651 (1966); *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 345-346 (1880). But the reason for this expansion was not to occupy the field or to preempt state and local action designed to remedy discrimination. Rather, the drafters of the Fourteenth Amendment expanded the power of Congress because they doubted that the States would adequately enforce the rights of the newly freed slaves to be free from unlawful discrimination.[5]

Against this background, it would be highly paradoxical to construe the Fourteenth Amendment to *reduce* the authority of state and local governments to deal with the problem of discrimination. The determination that racial discrimination was a national problem did not mean that it ceased to be a local problem. On the contrary, there is every reason to believe that the Framers of the Fourteenth Amendment would have welcomed state and local efforts to eradicate the effects of discrimination, where such efforts were forthcoming. Cf. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77-78 (1872) ("[T]he Fourteenth Amendment [did not] . . . transfer the security and protection of all the civil rights . . . from the States to the Federal Government"); see *Regents of the University of California v. Bakke*, 438 U.S. 265, 368 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

From a practical standpoint, local remedies for discrimination are likely to be far preferable to federal remedies. Congress lacks familiarity with local condi-

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[5] See, *e.g.*, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1872); Cong. Globe, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Howard) (Section 5 "enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation"); R. Harris, The Quest for Equality 53 (1960); J. tenBroek, The Antislavery Origins of the Fourteenth Amendment 204-207 (1951); H. Flack, The Adoption of the Fourteenth Amendment 138 (1965).

tions; it acts on the basis of nationwide generalizations that will necessarily be over- and under-inclusive. For example, while some industries have a record of racial discrimination throughout the Nation, it is also sometimes the case that the firms in a particular locality have engaged in discrimination even though the industry has an excellent national record. Under the court of appeals' approach, the local government's power to act in such a situation will be sharply limited. Congress will be forced to choose between imposing a national solution, which may be excessive, and allowing the problem to go without remedy.

Similarly, a local government will be able to tailor its remedy to local conditions. For example, any nationwide numerical goal or target will be unrealistically high for areas of the country with a low minority population, and too low to be a fully effective remedy in areas with a high minority population. Local programs will not encounter this difficulty. Of course, a national goal may contain a waiver provision, as the Section 103(f)(2) program did. But if variations are to be made to accommodate local conditions, it is far better that they be adopted through local political processes than by the discretionary judgments of a federal administrator.

b. Nothing in the opinions in *Fullilove* suggests that the Fourteenth Amendment's expansion of Congress's authority restricts the power of state and local governments to remedy discrimination. Members of the Court did, of course, emphasize the scope of Congress's power to enforce the Fourteenth Amendment. See, *e.g.*, 448 U.S. at 483 (opinion of Burger, C.J.); *id.* at 499-502 (opinion of Powell, J). But they did so only to answer arguments that Congress might lack the power to act in this area. See, *e.g.*, *id.* at 476 (opinion of Burger, C.J.). State and local governments have always had the authority—under the police power and, as here, by virtue of their power to control public expenditures—to act against racial discrimination. The opinions in *Fullilove* do not suggest that the existence of Congress's power

under Section 5 somehow derogates from that traditional state and local authority.[6]

c. Perhaps most important, local solutions to the problems of racial discrimination have crucial political and social advantages over federal measures. When a decision is made at the local level, the officials responsible for it can be held directly politically accountable. Consequently, a decision by the elected officials of a state or local government reflects a decision by the people most directly affected to address the problem of racial discrimination in a certain way. The process of considering and enacting a remedy like Richmond's can help build a consensus. If circumstances change, the remedy can be modified. A federal requirement, by contrast, is imposed coercively from above. Ultimately the problems stemming from racial discrimination will be solved not by such coercive measures but by the development of a consensus and an understanding at the local level.

As we have noted (pages 1-2, *supra*), state and local governments throughout the Nation have determined, through their elected representatives, that public contracting requirements comparable to Richmond's will help to remedy the effects of racial discrimination. In these ways, *Fullilove* has become "an important part of the fabric of our law" (*Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1459 (1987) (Stevens, J., concurring); see *id.* at 1461 (O'Connor, J., concurring in the judgment)). It has become the basis for political and economic accommodation of the various interests that are affected when the government attempts to remedy the effects of discrimination—an accommodation that has

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[6] Thus Chief Justice Burger's statement that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees" (448 U.S. at 483) must be taken to mean what it says: Congress's authority is *as broad as* that of state and local governments. The opinion does not say—and, in our view, it would be paradoxical and incorrect to say—that congressional power is broader.

taken place on the local level, in scores of localities and more than two-thirds of the States, throughout the Nation. There is no sufficient reason for upsetting these accommodations and precluding state and local governments from addressing the problem of discrimination in this way.

B. The Richmond Plan Promotes Compelling Government Interests And Does Not Impose Unfair Burdens On Nonminority Contractors.

Fullilove is, in our view, sufficient to dispose of this case. But there is no inconsistency between *Fullilove* and the standards established in the other decisions of this Court that have considered the constitutionality of race-conscious measures. Although the Court does not appear to have agreed on a specific formulation of these standards, it is clear that such a measure is constitutional if it is designed to achieve a sufficiently important government objective and if it is tailored so as not to impose undue burdens on individuals who are not members of minority groups.[7]

The Richmond Plan satisfies these standards. Indeed, although we do not believe that a state or local government must show a "compelling" interest in order to sustain a race-conscious remedy, the objectives that the Richmond Plan promotes are in fact compelling, and the burdens it imposes on nonminorities are minimal.

1. *The Richmond Plan promotes the compelling interest of remedying racial discrimination in the construction industry.*

The Richmond City Council explicitly stated that it was adopting the Minority Business Utilization Plan for the purpose of remedying prior racial discrimination. The court of appeals did not deny that the Plan would

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[7] See, *e.g.*, *United States v. Paradise*, 107 S. Ct. 1053, 1064 & n.17 (1987) (plurality opinion); *Wygant*, 476 U.S. at 274 (plurality opinion); *id.* at 286-287 (O'Connor, J., concurring); *id.* at 301-302 (Marshall, J., dissenting); *id.* at 313 (Stevens, J., dissenting).

be an effective means of remedying the effects of discrimination in the construction industry. Instead, the court ruled that Richmond did not have an adequate basis for concluding that such discrimination exists. In this section we address that aspect of the court of appeals' decision. In addition, we will explain why a race-conscious subcontracting requirement like Richmond's is an especially useful means—indeed, an indispensable means—of remedying discrimination in the construction industry.

The court of appeals also suggested that Richmond was entitled to remedy only its own discrimination, and that remedying discrimination in the construction industry did not constitute a sufficient government interest to uphold the Richmond Plan. We address that aspect of the court of appeals' reasoning in Part B2 below.

a. *i.* In *Wygant*, Members of this Court stated that a government may adopt a race-conscious remedy for past discrimination when it "ha[s] a strong basis in evidence for its conclusion that remedial action [is] necessary." 476 U.S. at 277 (plurality opinion). See also *id.* at 293 (O'Connor, J., concurring) ("a firm basis for concluding that remedial action [is] appropriate"). The Richmond City Council had more than a "strong basis" for concluding that there was discrimination in the construction industry. Perhaps the clearest evidence was the stark statistical disparity: minorities constitute half of Richmond's population, but have received only two-thirds of 1% of public construction contract funds.

The court of appeals dismissed this statistical demonstration as "spurious" (*id.* at 8a) and "not . . . meaningful" (*id.* at 10a). "The appropriate comparison," the court asserted, "is between the number of minority contracts and the number of minority *contractors*" (*id.* at 7a; emphasis in original). The court of appeals stated that the City's "[s]howing that a small fraction of city contracts went to minority firms," did not "demonstrate discrimination" because "the number of minority-owned contractors in Richmond was also quite small." *Ibid.*

This ruling is manifestly incorrect. The error in the court of appeals' approach is clear from numerous decisions of this Court, and it was recently explained by Justice O'Connor: when discrimination prevents minorities from "obtaining th[e] experience" that they need to qualify for a position, the "relevant comparison" is not with the percentage of minorities in the pool of qualified candidates but with "the total percentage of [minorities] in the labor force." *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1462 (1987) (opinion concurring in the judgment). See also *id.* at 1462-1463; *Steelworkers v. Weber*, 443 U.S. 193, 198-199 (1979); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). Discrimination does not merely prevent established minority contractors from obtaining contracts; it discourages and prevents minorities from entering the pool of contractors in the first place. The absence of the disparity on which the court of appeals insisted may simply be evidence that minorities, faced with widespread discrimination, did not quixotically enter a business in which they knew they would not be allowed to succeed.

An individual who wishes to take advantage of subcontracting opportunities must expend considerable resources. Such an individual ordinarily must incorporate, obtain bonding, hire managerial employees, buy or lease equipment, establish contacts with union hiring halls or other sources of labor, arrange credit, investigate bidding opportunities, and determine the bid that the newly formed firm can enter. These are costly operations. If there is discrimination at any stage—in the discretionary decisions of general contractors, in the practices of bonding companies, in the judgments banks or equipment leasing companies make about creditworthiness, in the willingness of skilled or unskilled laborers to work for a minority business—the minority group member is immediately placed at a competitive disadvantage. In these circumstances, few minority entrepreneurs will be willing to invest the necessary resources to establish a contracting

firm. They will pursue opportunities in a different field, where discrimination may be less of an obstacle to success.[8]

Significantly, these barriers continue to exist after acts of intentional discrimination have ceased. "[B]arriers to competitive access ha[ve] their roots in racial and ethnic discrimination, and . . . continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.). Experience—a "track record"—is highly important to any firm seeking contracting opportunities. *Id.* at 467. A network of contacts and a prior working relationship can be crucial in obtaining credit, bonding, or high-quality employees. See *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 570, 572 (1978) (describing hiring by construction "job superintendent" who "hired only persons whom he knew to be experienced and competent in th[e] type of work or persons who had been recommended to him as similarly skilled").

Indeed, it is often rational, and not an act of racial discrimination, for general contractors, banks, and others to give preferential treatment to firms that have an established record of reliability. This case furnishes an example: the district court found that a minority subcontractor interested in obtaining part of appellee's contract could not obtain a timely price quotation from a supplier because the minority entrepreneur "was unknown to" the supplier, and the supplier's agent "was not allowed to quote to unknown [firms] until they had undergone a credit investigation." J.S. Supp. App. 123. Because discrimination has prevented minorities from entering the field in the past, minority firms will continue to suffer the competitive disadvantages caused by relative lack of experience even if there is no longer any

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[8] On several occasions, this Court has recognized that entrenched hiring discrimination will deter minorities from applying for jobs. See, *e.g.*, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3036-3037 (1986); *Teamsters*, 431 U.S. at 365-367. It follows *a fortiori* that discrimination will discourage minorities from forming contracting firms, a much more expensive and difficult task.

intentional discrimination at all. Minority group members will, accordingly, be unwilling to establish firms, and the disparity on which the court of appeals insisted will not appear.

Of course, it is theoretically possible that these barriers were not the source of the virtual exclusion of minorities from Richmond's public contracting business. But it is extremely unlikely. See *Teamsters*, 431 U.S. at 342 n.23; *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring in the judgment). Faced with the undisputed fact that there were essentially no minority contractors in a City that was half minority, the Richmond City Council could have concluded either that virtually no minorities were willing and able to become contractors, or that some appreciable percentage had been excluded by discrimination. The Council, with its intimate knowledge of the City's history, thought the latter hypothesis was more plausible. There is no justification for denying the City the right to reach this conclusion.

ii. In addition to the statistical evidence, the Richmond City Council had other reasons to believe that discriminatory practices had denied minorities opportunities in the construction industry. For example, a member of the City Council, as well as the City Manager, speaking from experience, stated their judgment that there had been widespread discrimination in the construction industry. J.S. Supp. App. 38, 164-165. In addition, the discriminatory exclusion of minorities from craft unions is so notorious that this Court has held it a proper subject for judicial notice. *Weber*, 443 U.S. at 198 & n.1. Craft unions supply employees to construction firms, and often new construction firms are formed by craft workers.[9] Thus the historic discrimination against minorities by the craft unions is likely to have had a severe effect on minorities' opportunities in the construction industry. Finally, as the district court noted (J.S. Supp. App.

[9] See, *e.g.*, J. Gillies & F. Mittelbach, Management in the Light Construction Industry 27, 28 (1962); see generally R. Glover, Minority Enterprise in Construction (1977).

165), the City had before it the same evidence that Congress had when it enacted the *Fullilove* program—"abundant evidence from which [a legislature] could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination," and "direct evidence" that a "pattern of disadvantage and discrimination existed with respect to state and local construction contracting" (*Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.)).

The court of appeals considered this nonstatistical evidence insufficient because it was not captured in adequately "particularized findings" (J.S. App. 5a). As we noted above, this conclusion is inconsistent with *Fullilove*, and it ignores the realities of the legislative process. The court of appeals relied exclusively on *Wygant* for its contrary conclusion, but one Members of the five-Justice majority in *Wygant* fully explained why specific findings of prior discrimination should not be required. 476 U.S. at 289-293 (O'Connor, J., concurring). And it appears that a majority of the Court in *Wygant* rejected a requirement that a government must make formal findings of discrimination before adopting a race-conscious remedy. See *id.* at 312 n.7 (Marshall, J., dissenting).

The court of appeals rejected the City's reliance on the data developed by Congress with the statement that "[n]ational findings do not alone establish the need for action in a particular locality." J.S. App. 9a. But in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), a case involving an ordinance that arguably affected First Amendment rights, this Court squarely rejected—as "unnecessarily rigid"—the contention that because the City had not presented "studies specifically relating to 'the particular problems or needs of Renton,' the city's justifications for the ordinance were 'conclusory and speculative.'" *Id.* at 50 (citations omitted). This is

almost precisely the contention that the court below accepted.

Renton held that a City is "entitled to rely on the experiences of . . . other cities" even when it is regulating in an area involving constitutional rights. *Id.* at 51. A City is not required "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The statistical evidence of discrimination in Richmond gave the City ample reason to believe that the congressional findings were relevant to its situation.

Finally, the court of appeals' approach is insensitive to important practical considerations that affect state and local governments. First, as a practical matter, a requirement that a City compile a "record" or make specific "findings" with an eye toward judicial review will place all but the largest localities at an unwarranted disadvantage. Translating the insights, experience, and judgment of an elected official into a "record" or "particularized findings" suitable for judicial review is a task for a professional staff, preferably a staff with an extensive legal background. Congress and the Executive Branch of the federal government employ staffs that are adept at compiling a record that will withstand the kind of review that the court of appeals' opinion contemplates. But many medium-size and small localities—whose deliberations may be every bit as careful and thoughtful—do not employ, and cannot afford to employ, that kind of professional staff.

Second, and more important, the court of appeals' approach ignores the nature—and the special advantages—of the political process. The court of appeals appears to have required that state and local governments identify particular occasions on which identifiable acts of discrimination occurred. See, *e.g.*, J.S. App. 8a ("There has been no showing that qualified minority contractors who submitted low bids were passed over. There has

been no showing that minority firms were excluded from the bidding pool.").

Such a procedure—in which specific discriminatory acts or actors are identified—would benefit no one. It would require state and local governments to engage in a destructive process of recrimination and accusation if they wished to address the effects of racial discrimination through a race-conscious remedy. The genius of the political process is that it can often find a solution, even to problems as difficult as those implicated in this case, without reopening old wounds and setting individuals against each other. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 n. 10 (1974) ("The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves."). The divisive process envisioned by the court of appeals would forfeit these advantages.

b. A race-conscious subcontracting requirement is a fully appropriate remedy for the discrimination that Richmond found to exist in the construction industry. A measure that simply required the firms involved in the construction industry not to discriminate would not have been effective. Indeed, we do not understand the court of appeals to have suggested otherwise.

As we noted above, and as Members of the Court explained in detail in *Fullilove*, discrimination in the construction industry creates a variety of subtle but severe barriers to competitive success. Intentional discrimination can handicap a construction firm in ways that a mere prohibition against discrimination cannot prevent, no matter how diligently it is enforced. More important, even after intentional discrimination has ceased, minority firms will continue to suffer from its effects. A simple prohibition against discrimination will do nothing to remedy those effects. See pages 16-18, *supra*; *Fullilove*, 448 U.S. at 461-467, 477-478 (opinion of Burger, C.J.).

For example, as we have noted, a rational, nondiscriminatory general contractor will often prefer to

give work to a subcontractor with which it has worked on previous projects and which it knows to be reliable. A bank or a bonding company will have nondiscriminatory reasons for giving better terms to firms with a long record of reliable performance. Informal networks, developed over years of working together, will often be the best means of hiring good employees. See pages 17-18, *supra*.

In each of these areas, minority firms are at a competitive disadvantage because they lack experience and contacts; and they lack experience and contacts because of past discrimination. This disadvantage cannot be overcome simply by banning discrimination. It can be overcome only by a compensatory remedy that improves the competitive position of minority firms.

Richmond's subcontracting requirement accomplishes this task in a measured, tailored fashion. It is a temporary device; the City will reassess the need for a race-conscious remedy before extending it. It does not guarantee any particular contract to any minority firm. Because of the waiver provision, minority firms have an incentive to be as efficient as possible; if their costs are too high, a general contractor may obtain a waiver. Moreover, as the district court explained (J.S. Supp. App. 145-146):

> [U]nder the Plan, there remains every incentive for both MBEs and non-MBEs to compete against one another. . . . The Plan simply changes the structure of the competition, by requiring non-MBEs to team up, insofar as possible, with MBEs, to compete for contracts against other teams of non-MBEs and MBEs.

The Richmond Plan does, however, ensure that a general contractor will not lose a job because it has subcontracted with a minority firm that has higher costs as a result of past discrimination. And, of course, the Richmond Plan requires general contractors to make real efforts to seek out minority firms; it does not permit a general contractor to make a merely perfunctory effort before returning to the traditional ways of doing business.

2. *Richmond may enact a race-conscious remedy for prior discrimination in the local construction industry without admitting complicity in racial discrimination.*

As we have explained, the Richmond City Council had more than sufficient basis for concluding that racial discrimination in the construction industry blocked minority access to city construction contracts, and the Richmond Plan was well designed to remedy this situation. But passages in the opinion below suggest that the court imposed an additional requirement on Richmond: the City, the court of appeals suggested, could enact a race-conscious plan only to remedy its own prior discrimination. The Richmond Plan, according to the court of appeals, could not be justified as a remedy for discrimination in the construction industry, no matter how conclusively Richmond demonstrated the existence of that discrimination, unless the City itself was in some sense guilty of discrimination. See J.S. App. 5a, 6a, 8a, 9a.

This conclusion is erroneous. In some circumstances, a local government is obligated to use race-conscious means to remedy its own discrimination. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971); see also *Green v. County School Board*, 391 U.S. 430 (1968). The question in this case, however, is not what a state or local government is obligated to do but what it *may* do. It is well established that a state or local government not only may act to remedy private discrimination but has the most compelling interest in doing so. Moreover, both logic and this Court's decisions support the conclusion that a state or local government may use race-conscious measures to remedy private discrimination and its effects.

a. This Court has repeatedly recognized that governments have an interest of the highest order in eliminating private discrimination and its effects. See, *e.g.*, *Board of Directors v. Rotary Club*, 107 S. Ct. 1940, 1947 (1987) ("the State's compelling interest in eliminating discrimination against women"); *Bob Jones University*

v. United States, 461 U.S. 574, 604 (1983) ("[T]he government has a fundamental, overriding interest in eradicating racial discrimination"); *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945). Indeed, the Court has recently ruled that a State government's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—an interest similar to that asserted by Richmond in this case—is not only a "compelling state interest[] of the highest order" (*Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984)), but is sufficiently weighty to justify the infringement of a constitutional right (see *id.* at 623). See also *id.* at 632 (O'Connor, J., concurring) ("the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society").

b. The City's interest in combatting private discrimination is even stronger in this case, because the City is attempting to ensure that its own expenditures of public funds do not contribute to the harms caused by discrimination. Richmond is not acting merely as a regulator of private affairs, as the States were in *Roberts*, *supra*, and *Rotary Club*, *supra*; instead, the City is attempting to prevent its own spending decisions from supporting subtle forms of discrimination or perpetuating the effects of past discrimination. The Court has recognized that a local government has unusually great latitude to promote its interests when it is not acting in a regulatory capacity but is, for example, "expend[ing] only its own funds in entering into construction contracts for public projects" (*White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 214-215 (1983)). See also *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-437 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). When, as here, the City is attempting to avoid giving support to private racial discrimination and its effects, the City's power is at its greatest.

We note in this connection that several courts have held that a state or local government can violate the Con-

stitution by entering into contractual relationships with private firms that discriminate.[10] See also *National Black Police Association v. Velde*, 712 F. 2d 569 (D.C. Cir. 1983) (officials are subject to personal liability if they knowingly provide public funds to recipients engaged in discrimination), cert. denied, 466 U.S. 963 (1984). While we do not agree with these decisions, they further establish the extraordinary weight of state and local governments' interest in ensuring that public funds are not spent in a way that perpetuates racial discrimination or its effects. Cf. *Norwood v. Harrison*, 413 U.S. 455 (1973).

c. In view of the extraordinary importance of the government's interest in eliminating private discrimination and its effects, it would be unreasonable to preclude state and local governments from using race-conscious measures in appropriate circumstances. The Court has approved race-conscious remedies for government discrimination because there are occasions on which government discrimination, and its effects, cannot be eliminated without such measures. See, *e.g.*, *North Carolina State Board of Education*, *supra*; *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

The same is sometimes true of private discrimination. As the Court has recognized, sometimes a mere requirement of nondiscrimination is not enough to prevent such discrimination or to alleviate its effects. See, *e.g.*, *Local 28 of Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3036-3037 (1986); *Fullilove*, *supra*. See also *Paradise*, 107 S. Ct. at 1065-1072. The Court has specifically stated that a school board may voluntarily remedy de facto segregation—segregation that is not the result of discrimination by the government—by adopting a race-conscious student assignment policy. *Swann v. Charlotte-Mecklen-*

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[10] Notably, many of these cases involved the construction industry. See, *e.g.*, *Percy v. Brennan*, 384 F. Supp. 800, 811-812 (S.D.N.Y. 1977); *Byrd v. Local No. 24, IBEW*, 375 F. Supp. 545, 559-560 (D.Md. 1974); *James v. Ogilvie*, 310 F. Supp. 661 (N.D. Ill. 1970); *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

burg Board of Education, 402 U.S. 1, 16 (1971). See also *North Carolina State Board of Education*, 402 U.S. at 45.

We of course recognize that race-conscious measures must not be imposed casually, for whatever reason they are adopted. They must be supported by appropriate government interests. Moreover, the government must take care that they do not unfairly burden nonminorities. But there is no basis for wholly prohibiting state and local governments from using such measures to remedy discrimination in appropriate cases, even if the discrimination does not have its source in the government's own actions.

d. The court of appeals' conclusion that a state or local government is limited to remedying its own discrimination was based entirely on statements from *Wygant*. See J.S. App. 5a, quoting 476 U.S. at 274 (plurality opinion of Powell, J.). See also *Wygant*, 476 U.S. at 288 (opinion of O'Connor, J.). Understood in context, however, these statements do not support the court of appeals' conclusion.

Wygant involved a provision of a collective bargaining agreement under which a school board, in making layoffs, was to maintain a certain racial balance among teachers. See 476 U.S. at 270-272 (plurality opinion). That affirmative action provision, if analyzed as a remedial measure, was capable of being justified only in one of two ways—as a remedy for prior discrimination by the school board, or as a general response to the fact that widespread discrimination in society has placed racial minorities in a disadvantaged position. See *id.* at 288 n.* (opinion of O'Connor, J.).[11]

Justices Powell and O'Connor were concerned to reject the suggestion that this latter notion of societal discrimination could justify the provision. Justice Powell reasoned that such a justification is "too amorphous" and

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[11] The school board also suggested that the measure could be justified on the ground that it provided "role models" for schoolchildren (see 476 U.S. at 274 (plurality opinion)), but that is a nonremedial justification that has no counterpart in this case.

"overexpansive"; because "[n]o one doubts that there has been serious racial discrimination in this country," any remedies based on this notion of societal discrimination would be "ageless in their reach into the past, and timeless in their ability to affect the future." *Id.* at 276 (plurality opinion).

It was in this context—in which the only suggested remedial justifications were an open-ended notion of societal discrimination, on the one hand, and "discrimination by the local government unit in question" on the other—that Justices Powell and O'Connor insisted on the latter. Richmond, however, did not enact its Plan on the basis of an open-ended assertion of societal discrimination. Rather, Richmond is attempting to remedy discrimination in a specific industry, on the basis of abundant evidence (including evidence of which this Court has taken judicial notice) that such discrimination exists. Such a remedial effort does not present the problems of limitlessness and amorphousness with which Justices Powell and O'Connor were concerned.

This interpretation of the statements in *Wygant* is confirmed by Justice Powell's opinions in both *Bakke* and *Fullilove*. In *Bakke*, Justice Powell contrasted "identified discrimination" with " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past." 438 U.S. at 307. In *Fullilove*, where there was no suggestion of prior discrimination by the federal government, Justice Powell again emphasized that "identified" discrimination was sufficient to uphold the race-conscious remedy. See 448 U.S. at 496, 497, 515. This demonstrates that Justice Powell's concern was that the discrimination be "identified"—that is, that it be narrower than general societal discrimination—not that it be attributable to the government actor in question. In *Wygant*, the only form of identified discrimination was discrimination by the unit of government itself. Richmond, however, is addressing another form of identified discrimination. Its Plan is therefore fully consistent with Justice Powell's approach.

3. *Richmond's plan does not unfairly burden nonminority contractors.*

The Court has emphasized that race-conscious remedial measures must not impose undue burdens on nonminorities. See, *e.g.*, *Johnson*, 107 S. Ct. at 1455-1456; *Wygant*, 476 U.S. at 282-284 (opinion of Powell, J.). The burdens that the Richmond Plan imposes on nonminorities can fairly be characterized as minimal. At all events, they are well within the range permitted by this Court's decisions.

To a large extent, the burdens imposed by the Richmond Plan fall on the City itself. They are therefore distributed among the taxpayers. Not only is this perhaps the fairest way of dealing with the costs of remedying discrimination, but it ensures that there will be a political check on the program. If its costs grow too great, not isolated individuals but the taxpayers as a whole will demand that the Plan be modified or repealed. Because it spreads much of its cost among the taxpayers, the Richmond Plan is superior to nearly every other remedial measure that this Court has considered; those measures imposed virtually the entire burden on specific individuals and shifted little or none of it to the taxpayers (or to a comparably large group).[12]

The principal burden of the Richmond Plan falls on the taxpayers because a general contractor can include

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[12] In the cases involving competitive seniority—*Wygant*, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), and also, in important respects, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976)—the burden fell entirely on the nonminority employees who lost the benefits of their seniority; it is difficult to identify any burden that fell on the employer or could be passed on to taxpayers or customers. In cases involving affirmative action in hiring, promotions, or university admissions—*Paradise*, *Johnson*, *Local No. 93, Firefighters v. Cleveland*, 478 U.S. 501 (1986), *Local 28 of Sheet Metal Workers*, *Weber*, and *Bakke*—the government or employer incurred, in theory, the additional cost of employing or educating a minority applicant who was supposedly less well-qualified. But in practical terms that cost is not likely to be great. Realistically, the burden fell on the disappointed applicant.

in its bid—and thereby pass through—any additional costs that reflect the competitive disadvantage of the minority subcontractors. Neither the general contractor, nor any bonding or lending institution, nor any other firm that deals with the minority subcontractor, is forced to incur additional net costs.

It is of course true that the Plan is likely to cause some nonminority subcontractors to lose business. But in this respect, as well, the Plan contrasts sharply, and favorably, with the measures that this Court has invalidated in the past. The collective bargaining agreement in *Wygant*, for example, resulted in layoffs of nonminority employees whose seniority would otherwise have protected them. This aspect of *Wygant* was crucial to the outcome of that case. See 476 U.S. at 282-284 (Powell, J.); *id.* at 294-295 (White, J., concurring).

By contrast, the burden imposed on individual firms by the Richmond Plan—like the burden imposed by the federal program upheld in *Fullilove*—is "limited and so widely dispersed that it[] . . . is consistent with fundamental fairness." *Fullilove*, 448 U.S. at 515 (Powell, J., concurring) (footnote omitted). The Richmond Plan affects only the construction industry, only a segment of that market—municipal contracts—and only 30% of the dollar volume of that segment. We know of nothing in the record that suggests that any costs that the Richmond Plan imposes on nonminority contractors will be concentrated on a few firms. Moreover, far from uprooting settled expectations acquired through years of seniority, the Richmond Plan threatens only the contingent possibility of future economic gain. This interest, as the Court has emphasized, has always been entitled to only minimal legal protection. See, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 (1976); *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-309 (1927) (Holmes, J.).

Finally, since Richmond had ample reason to conclude that there was substantial discrimination in the con-

struction industry, "it was within [the City's] power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Fullilove*, 448 U.S. at 485 (opinion of Burger, C.J.). As we noted, following Justice Powell's logic in *Fullilove*, the 30% figure chosen by Richmond was a reasonable estimate of the amount of City contracting dollars that would have reached minorities in the absence of discrimination. See page 8, *supra*. There is reason to believe, therefore, that the nonminority firms that are disadvantaged by the Richmond Plan may be losing only opportunities that they would not have had in the absence of prior discrimination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 21, 1988